UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THOMAS J. MOYLE, JR., INC.
d/b/a MOYLE CONSTRUCTION

and Case 18–CA–165458

TROY A. HAAPALA, an Individual

Renée M. Medved, Esq., for the General Counsel.

Christopher J. Johnson, Esq. (Jackson Lewis, P.C.), of
Milwaukee, Wisconsin, for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. Troy Haapala worked for 18 years as a laborer for Moyle Construction. In the summer of 2015, Haapala decided that he wanted to try and improve his and other employees' working conditions by asking his employer to restore health insurance benefits. Haapala enlisted the assistance of another employee and a union organizer to draft a letter requesting those benefits for employees. He also sought a meeting with management to discuss the issue. On September 21, 2015, Haapala sent the letter to Thomas J. Moyle Jr., the Company's founder and namesake. On September 28, Haapala had a meeting with Moyle Jr. where they discussed his letter. Then on October 6, or 8 days after that meeting, the Company discharged Haapala. The General Counsel's complaint in this case alleges that the Respondent, by Moyle Jr., violated Section 8(a)(1) repeatedly during his September 28 conversation with Haapala. The complaint likewise alleges that the Respondent violated Section 8(a)(3) by discharging Haapala for his union and protected concerted activities. The Respondent denies the allegations and asserts that Haapala was discharged by a new supervisor due to a lack of productivity. I conclude the Respondent has violated the Act in these alleged manners.

STATEMENT OF THE CASE

On December 4, 2015, Troy A. Haapala (the Charging Party) filed a charge against Thomas J. Moyle, Inc. d/b/a Moyle Construction (the Respondent or the Company). On January 22, 2016, Haapala filed an amended charge and, on February 22, 2016, he filed a second amended charge. On March 29, 2016, the General Counsel issued a complaint against the Respondent. The complaint alleges the Respondent violated Section 8(a)(1) about September 21,

2015, by accusing employees of disloyalty; repeatedly threatening employees with unspecified reprisals; equating protected concerted activity with bullying; and threatening employees that it would cease or subcontract its operations. The complaint also alleges the Respondent, about October 6, 2015, unlawfully created the impression among its employees that their union and protected concerted activities were under surveillance. Finally, the General Counsel claims that the Respondent discharged Haapala due to his union and protected concerted activities, also on October 6, 2015. The General Counsel issued an amended complaint on June 7, 2016. The only changes to the amended complaint involved allegations concerning the supervisory and agency status of certain individuals. The Respondent filed timely answers to the complaint and the amendment, in which it denied the allegations.[1] I conducted a trial on the complaint on June 29 and 30, 2016, in Houghton, Michigan.

On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged as a contractor in the building and construction industry, including from a facility in Houghton, Michigan. During the calendar year ending December 31, 2015, the Respondent, in conducting its business operations described above, purchased and received, at its Houghton, Michigan facility, goods valued in excess of $50,000 directly from points outside the State of Michigan. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint. I also find, as alleged in the complaint, that Ironworkers Local 8 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.[2]

[1] On July 29, 2016, the General Counsel filed a motion to include the Respondent's answer in the formal papers and all of the pages for GC Exhibit 4 in the record. The Respondent does not oppose and I grant the motion.

[2] In its answer, the Respondent denied the labor organization status of Ironworkers Local 8, based upon an alleged lack of knowledge. Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions or work." At the hearing, Lucas Bradshaw, an organizer for Ironworkers Local 8, testified that the organization represents workers across Wisconsin and Michigan and has collective bargaining agreements covering those states. (Tr. 204.) Bradshaw also testified that he and striking employee William Wanhala made house calls to talk to Moyle Construction employees, including Haapala. (Tr. 212.) The testimony demonstrates that Ironworkers Local 8 deals with employers and addresses working conditions. It also is sufficient to establish employee participation. Thus, the statutory requirements to establish labor organization status have been met.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background on the Moyle Companies and Thomas J. Moyle Jr.

The Respondent, Moyle Construction, is a family–owned, commercial building contractor in the construction industry. The business is one of multiple entities bearing the Moyle name and owned or operated by Moyle family members. The other businesses include Moyle Real Estate & Development and Valley View Quarry. Moyle Construction has performed work for Moyle Real Estate in the past. The Respondent and the other two businesses operate out of the same office building in Houghton, Michigan. The Respondent also has a warehouse at that location.

The Respondent was founded by Thomas J. Moyle, Jr. (Moyle Jr.) and his wife in 1976. (GC Exh. 4.) At times material to this case, his daughter–in–law, Kim Moyle, owned Moyle Construction. Information concerning all of the Moyle companies is contained on the same website, www.moyleusa.com. According to the website, Moyle Jr., as CEO of Moyle Inc., and "equal shareholders" Kim Moyle, Gary Moyle, and Andy Moyle named Thomas R. Helminen the president of Moyle Construction in 2009. Gary and Andy Moyle are Moyle Jr.'s sons. As President, Helminen is in control of and manages Moyle Construction. However, Moyle Jr. retained the position of CEO of Moyle Inc. thereafter. He also continues to work out of his office at the building from which the Respondent operates.

Eric Laitinen has worked for the Respondent for approximately 7 years. About May of 2015, Laitinen became the operations manager and safety director. At the time of the hearing, the Respondent had roughly 25 employees. This number was down from 100 employees when Laitinen started. One of the remaining employees was Haapala, a laborer, who began working for the Respondent in 1996. In his position, Haapala performed a variety of tasks assisting other trades and operating equipment on jobs.

In 2014 and 2015, Haapala saw Moyle Jr. on jobsites where Haapala was working for the Respondent. This occurred about 2 to 3 times per month. When he visited, Moyle Jr. wore a white hardhat, which signified a supervisor. Employees on the jobsites wore red hardhats. Moyle Jr. would give pep talks to the Respondent's employees, including Haapala. Moyle Jr. also talked to the Respondent's supervisors about progress on the jobs.

B. The Respondent's Position on Unions

The Respondent's employees are not unionized. Section 1.2 of the Company's employee handbook, in effect in October 2015, is entitled: "Working in a Merit Shop in Michigan, a 'Right To Work' state." (GC Exh. 19, p. 1.) The section states:

> Our merit shop firm, like more than eighty percent of all businesses and institutions throughout the United States, is union–free. There is always a chance, however, that in the future a labor union organizer will try to persuade some of our employees to sign union authorization cards. For this reason, it is important that you understand our position concerning unions.

> To say it simply and clearly, while you have the legal right to join a labor union, you also have the legal right NOT to join a union. We believe that remaining union–free has definite advantages for you, our employees. For instance, along with labor unions can come many changes, such as:
>
> a. Restrictions on your individual freedom to discuss and solve your problems directly with us and without union involvement;
> b. Your compulsory union membership and dues;
> c. Union discipline, fines, suspension and expulsion from membership;
> d. Union control over you through the union's constitution and bylaws;
> e. Union politics;
> f. Union coercion and violence;
> g. Union hypocrisy;
> h. Union strikes and strike assessments; and
> i. Resulting job replacements, sometimes temporarily, sometimes forever.
>
> In other words–unions have fostered turmoil, job insecurity, dollars out of workers' pockets, and loss of independence.
>
> If a labor union organizer ever asks you to sign a union authorization card, remember that it is a legally binding document in which you sign away your right to individual freedom in our workplace for exclusive representation by that union. We hope you would hesitate–and think carefully–before signing any such union pledge card. It could be your first step into the turmoil described above. It might be like signing a blank check and giving it to a stranger!
>
> We have the ability, the desire, the expertise, and the personnel to solve our problems and move forward by working together in the merit shop way–without interference from union outsiders. Based on these facts, we believe a labor union is unnecessary and unwanted here.

This provision is the very first substantive one in the Respondent's handbook.

C. Troy Haapala's September 21, 2015 Letter to Moyle Jr.

When Haapala began working for Moyle Construction, the Company provided health insurance to its employees. However, around 2007, the Respondent's employees voted to discontinue the benefit, apparently in exchange for a pay increase. The lack of insurance became problematic for Haapala around the summer of 2014. Haapala spoke to multiple employees

about the need for health insurance thereafter. In January 2015, Haapala and striking employee William Wanhala discussed the lack of health insurance and other issues the two had in the workplace with Lucas Bradshaw, an organizer for the Union.

In August 2015 and as a byproduct of the earlier discussions, Haapala resolved to take action in the hopes that the Respondent would restore health insurance for employees. He decided to write a letter to Moyle, Jr. to express his concerns and ask for a sit down to discuss health insurance. Haapala used his cell phone's voice to text feature to "chicken scratch" his thoughts into a letter. Thereafter, Haapala met Wanhala and Bradshaw at a local hotel. Haapala showed the two his write up. The group discussed what Haapala wanted to say and to accomplish with the letter. Bradshaw drafted a letter on a computer based on that discussion.

The group met again at the same hotel in September 2015. They reviewed the draft letter and Bradshaw made final edits based upon Haapala's suggestions in real time on the computer. Bradshaw printed off a copy of the letter to Haapala. The three discussed how Haapala should send the letter to Moyle Jr. via certified mail, to insure they had proof that he received it. Haapala asked Wanhala to mail the letter for him. Wanhala did so and provided Haapala with a return receipt.

The letter Haapala sent to Moyle was dated September 21, 2015.[3] The letter stated:

> Over the past 18 years I have been a very loyal employee of Moyle Construction. I've enjoyed the time I've spent with the company and appreciate everything Moyle Construction has done for me and my family.
>
> I started my career as a motivated, young man who was eager to get out on the job, learn my trade, and start making money. Currently, I am supporting a happy and growing family. But with the joys of having a family also comes increased needs.
>
> Over the past year, Bill Wanhala has visited my house to discuss multiple workplace issues that he has experienced working at Moyle Construction. Among these issues is the need for Moyle Construction employees to have health Insurance. Though I don't agree with every issue Bill has raised with me – or some of the tactics he is using to help solve those issues – access to dependable, affordable healthcare is an issue that is very important to me.
>
> At work, I have also seen Bill and his supporters in front of our job with banners that read "Moyle Employees work hard and deserve health insurance." Frankly, that is a sentiment I support; I know we work hard and I believe we deserve health insurance. Which is why I would like you to consider Moyle Construction providing

[3] All dates hereinafter are in 2015 unless otherwise specified.

> me and my coworkers a reliable, affordable, group healthcare plan. I believe providing healthcare to employees would be beneficial to the company, as well as all of the employees. It would provide an incentive to employees to work hard and show loyalty to the company, as well as alleviate the headaches workers face with the ever–changing healthcare laws and healthcare mandates.
>
> I have spoken to my coworkers about this and would like to meet with you, my available coworkers, and any other parties who would be interested in sitting down to discuss options for obtaining health insurance as soon as possible. You may contact me by mail at "Troy Haapala 57337 2nd Street Calumet, MI 49913". Thank you, and I look forward to hearing from you.

(GC Exh. 2.) The Respondent received Haapala's letter on September 24.[4]

D. Haapala's Meeting with Moyle Jr. on September 28, 2015

On September 28, Haapala went to the Respondent's office in the late afternoon to turn in his timecard. Moyle Jr. saw Haapala and called him into Moyle Jr.'s office, where only these two individuals were present. Moyle Jr. and Haapala first discussed how one of Moyle Construction's former workers had to quit due to health problems. Moyle Jr. paused, then told Haapala he had received Haapala's letter. Moyle Jr. stated: "What's up? Friends don't send friends a registered letter." (Tr. 75.)

Haapala responded that health care issues were always a concern of his, before the Union started picketing and bannering. He said he talked to his fellow employees about it over time and that he supported the bannering concerning healthcare. Moyle Jr. reminded Haapala that employees had voted out the healthcare. He stated it was voted out because other people's spouses had insurance and they were paying double for it. Moyle Jr. then asked Haapala if he had gone to the health exchange. Haapala told him, for a single person in his position, it was quite expensive: $250 a month with a $5,000 deductible. Moyle Jr. responded that his family pays around $1,500 or $1,600 per month for his insurance, so the exchange for Haapala was not really a bad deal and he probably should take it. Moyle Jr. asked him why he didn't sign up. Haapala said he thought the exchange was not secure with peoples' identities and the website was difficult to access when it first came out. Haapala said he felt it would be better having something deducted out of his paycheck and dealing with an insurance agent. Moyle Jr. told Haapala he did not have anything lined up, but he had some people looking into it.

[4] In making the findings of fact in this section, I credit Haapala's testimony. (Tr. 52–70, 158–161, 166–168.) His testimony was detailed and forthright. It also was corroborated in material aspects by both Wanhala and Bradshaw. (Tr. 212–218, 223–236, 254–258.) I find any differences in their testimony irrelevant, but credit Haapala where the witnesses' testimony conflicts. It is logical that Haapala would have a stronger recollection of these events, because the letter was his brainchild. As to the date of the Respondent's receipt of the letter, I rely on the stamp contained therein stating "Received SEP 24 2015 Thomas J. Moyle, Jr., Inc." Finally, with respect to Wanhala's status as a striking employee, I credit his uncontroverted testimony. (Tr. 245–247.)

Haapala then told Moyle Jr. he was a little frustrated about how to go about doing this. He told Moyle Jr. that the letter was about healthcare for the employees, not a tactic to go union. Moyle Jr. responded, well, what has the union ever done for us? He added that the Union had always been a thorn in their side causing problems. He said the union came in a while ago and made an offer. Moyle Jr. said he didn't like it, so he sent them away.

Moyle Jr. then told Haapala, if you're doing this to cause problems, you don't want to be burning your bridges. He said, if Haapala was offered a better job, he should take it. Moyle Jr. said he recommends that to any of his employees, if they can better themselves, just do it. Moyle Jr. reiterated, if you're doing this to cause problems, then you don't need to be burning your bridges. Moyle Jr. paused, then said, "I don't like being fucked with, not from the union, or any of my employees." (Tr. 78.)

Haapala apologized and said the focus of the letter was about healthcare, and he was not trying to get the Company to go union. Moyle Jr. said, "if I have to, I would shut this place down. I would micromanage everything and let things go, if I had to."[5] Moyle Jr. added "I don't like being bullied by anyone." Haapala apologized again and said this is about healthcare and he was not trying to do anything about the Union. Moyle Jr. said, "don't be burning your bridges, Troy."

Haapala told Moyle Jr. he had a meeting later that night and he was running late to be with his fiancée and son for a get-together at school. Haapala apologized and said he had to leave. Moyle Jr. said have a good day.[6]

E. The Respondent's October 6, 2015 Discharge of Haapala

On Monday, October 5, Haapala began work on the Watersmeet project, where Laitinen had told him to report. The Respondent was putting in a boardwalk at the jobsite. The work crew there included Supervisor Pat Pattison and two other employees in addition to Haapala.

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[5] Haapala testified that his understanding of the term "micromanaging" in the construction industry is when a small group of people from a company manage a job, but the company hires other construction companies to come in and do the actual work that needs to be done.

[6] In making the findings of fact in this section, I credit Haapala's testimony. (Tr. 70–82, 173–184.) Moyle Jr. did not testify at the hearing and, thus, Haapala's testimony is uncontroverted. Because Haapala's testimony is uncontroverted, I do not rely on the testimony of Wanhala, Bradshaw, and Haapala's fiancée, Wendy Smith, about what Haapala later told each of them regarding his conversation with Moyle Jr.

I also reject the Respondent's attempt to rely on, as substantive evidence, the position statement it submitted to NLRB Region 18 during the investigation of the unfair labor practice charge in this case. (GC Exh. 15.) The General Counsel admitted the position statement at the hearing. Pursuant to long–standing Board precedent, statements therein constitute admissions of a party opponent. See, e.g., *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 705 fn. 6 (1992); *Florida Steel Corp.*, 235 NLRB 1010, 1011–1012 (1978). The Respondent did not later disavow the assertions it made in the position statement. In its posthearing brief, the Respondent attempts to rely on the description of the September 28 conversation between Haapala and Moyle Jr. it provided in the position statement. (GC Exh. 15, pp. 5–6, 8–9.) As to the Respondent, these assertions are inadmissible hearsay. *Consolidated Accounting Systems*, *Inc.*, 225 NLRB 93, 95 (1976). Accordingly, I grant the General Counsel's motion to strike the portions of the Respondent's brief that discuss the September 28 conversation between Haapala and Moyle Jr.

Pattison reports to Laitinen. On the first day, the crew was putting in the understructure of the boardwalk. Haapala's job was to put in stainless steel screws into fields where they were missing. The employees finished this portion of the job that day. Pattison told the crew that they had done a good job and would start putting the deck down the next day.

On October 6, the crew began putting in the boardwalk. Two employees were putting the board downs and tacking each end. Then Haapala would "fill in the field," or put into the board the remaining 8 to 10 screws needed to hold it in place. As the work proceeded, the two employees laying the boards down were no more than three to four boards ahead of Haapala. At one point, Pattison told the employees that Laitinen would be there that evening. He added that it looked like he and Haapala would remain on the project the next day putting in the boardwalk, but the other two employees were going to a different jobsite.

Moyle Jr. visited the jobsite that day as well, right before lunch. He told the crew that he had another business matter he was going to and was passing by. Moyle Jr. said he just wanted to see how they were progressing. He told the crew they were doing a fine job. Moyle Jr. was there for approximately 20 minutes.

Sometime after 4 p.m., Laitinen arrived at the jobsite. An hour later, Haapala finished working and went across the road to his car. Laitinen called out and asked Haapala to hold on. Laitinen crossed the road and told Haapala he needed to speak to him. He said, "you might have not been noticing, but I've been watching you on the side." (Tr. 95, 155–156.) Laitinen added that he had asked Haapala to step up, but Laitinen felt Haapala was not pulling his weight. He concluded by telling Haapala, today is your last day and you're no longer with Moyle Construction. Haapala said, you mean I'm fired? Laitinen responded yes. He added that he wished Haapala the best of luck and maybe there was something better out there for him. Haapala said he understood.[7]

After becoming operations manager in May, Laitinen kept a log in a calendar notebook of certain jobsite visits he made. His entry for October 6 states: "Troy's last day. Discussed his lack of performance @ end of day. He had no comments or indicated he would improve."[8] (R. Exh. 1, p. 5.)

Laitinen also wrote and submitted a letter to Haapala's personnel file documenting the discharge. (R. Exh. 3.) The letter stated:

> On Tuesday, October 6, 2015, Troy Haapala's employment at Moyle Construction was terminated due to his lack of productivity. On several occasions, Troy and I discussed the need for him to increase his assigned task productivity. In these instances, Troy

[7] The findings of fact to this point in this section are based on Haapala's testimony, which I credit. (Tr. 84–95, 153–158.) His testimony was detailed and consistent during cross–examination. In contrast, Laitinen's testimony concerning their conversation was brief and nonspecific. (Tr. 341–343.) In any event, no material differences exist between Haapala's and Laitinen's testimony concerning their conversation.

[8] It also appears that Laitinen wrote "FIRED" in the log, but the word cannot be made out definitively.

> was giving (sic) very achievable production goals for the day. At no time did I see an increase in task productivity following our discussions.
>
> On October 6, 2015, I had the opportunity to further observe Troy's productivity. At the end of the day, Troy and I met to again discuss his lack assigned (sic) task productivity. At this time, I terminated Troy's position at Moyle Construction.

At the hearing, Laitinen said only the following about his observation of Haapala's work at the Watersmeet jobsite on October 6:

> My evaluation [was] that he was installing screws on deckboards, doing a lot of talking, which was typical of Troy, to the other employees. And there was certainly–[i]f there was a time where he would have caught up, there were a lot of other tasks that needed to be done . . . Troy was there to keep the work as simple and as limited as he could.

(Tr. 325–326.)

The Respondent's employee handbook contains termination policies which state: "Coordination of all separations, voluntary and involuntary, is handled by the President and your immediate supervisor." The handbook also contains a progressive disciplinary procedure. The progression under that policy is a verbal warning for a first offense; a written warning for a second offense; and a second written warning which can be used as grounds for probation, suspension, or discharge. However, the Respondent also reserved the right to immediately discharge an employee "if in the judgment of your immediate supervisors and managers, the employee's conduct cannot be corrected, or if it seriously threatens the well-being of the Company or other employees." (GC Exh. 19, pp. 27, 34.) Finally, the Respondent's handbook states in the "Work Performance" section that "[p]oor job performance can result in disciplinary action, up to and including termination." (GC Exh. 19, p. 25.)

Prior to his discharge, the Respondent had not issued any written discipline to Haapala regarding his alleged lack of productivity. The only discipline Haapala received was in November 2012, when he failed to have proper paperwork on a jobsite to meet the requirements of the Mine Safety and Health Administration. (GC Exh. 16.)

F. Haapala's Work Performance Prior to His Discharge

From 1996 through June 2015, the Respondent did not have any issues with Haapala's work productivity. The Company issued positive, written performance appraisals to Haapala in 2007, 2008, 2009, and 2010.[9] (GC Exh. 17.) It also gave him hourly wage increases in 2011,

[9] The Respondent apparently did not provide any written performance appraisals to Haapala after 2010. However, Haapala testified without contradiction that he got performance appraisals every year and that Helminen conducted them. (Tr. 98–99.)

2013, 2014, and 2015. (GC Exh. 7.) The Respondent's employee handbook states that an employee's "salary or hourly wage and your advancement will be based on your performance." (GC Exh. 19, p. 25.) Haapala's last wage increase became effective May 4. (GC Exh. 8.) In that month, Helminen met with Haapala to discuss his performance. Helminen told Haapala he was a good worker and Helminen had nothing bad to say.

After Laitinen became operations manager at the end of May, he had a conversation with Haapala concerning Haapala's work performance going forward. This was at the Somero jobsite where Haapala was performing block work. Laitinen told Haapala about his new position. He said to Haapala that he was a good worker. He then noted that the company had a small group of people and he was really asking them to step up to the plate and give it some more. Laitinen told Haapala he knew Haapala had it in him, and Laitinen would like to see him do more work. Haapala responded he would do the best he could.[10]

Laitinen's logbook contains two notes about Haapala's performance on that job. (GC Exh. 21.) On May 22, Laitinen wrote: "Block going well. Beeting (sic) the numbers by 25–35 block per guy." On May 28, Laitinen wrote: "Good @Somero. Troy . . . good."

In July, Haapala performed work for the Respondent at the Copper Country Mall. Billy Heide, the Respondent's senior vice president, was running this jobsite. Randy Riutta was the Respondent's foreman there. Haapala was assigned to paint the interior and exterior of an Xpress Storage building, as well as to paint exterior awnings of a JC Penney's store. Laitinen's logbook contains a note for July 3, stating: "Troy? Slow worker? Cost?" (R. Exh. 1, p. 1.) An entry for July 17 stated: "Still painting at CCM (JCP). Slow talked with Troy. Need to work with a purpose. No excuse for time taking." (R. Exh. 1, p. 2.) An entry for July 24 stated: "CCM storage visit today. Not painting today? Troy did not show up. No one seems to know what's up. Painting needs kick in the ass. Way to (sic) long." (R. Exh. 2.)

When performing this painting work, Haapala encountered a number of issues which slowed his progress. These included conflicting instructions from Laitinen and Heide about how to perform the interior painting; wet blocks that could not be painted until they dried out; running out of paint three times; and a broken scissor lift. Laitinen was advised of each of these issues by Heide, Riutta, or Haapala.

In August, Haapala was assigned to a cleanup project at Canal Crossings apartments. The property had been damaged due to a water leak. Laitinen wrote an entry in his logbook for August 24. (R. Exh. 1, p. 3.) The entry stated: "Troy is cleaning, slow going, someone else?" A second entry dated September 3 stated: "Troy's works (sic) @ slow pace. Kenny may need additional help. Kenny said he spoke with Troy to pick it up. Job ok shape." (R. Exh. 1, p. 4.) This was Laitinen's last logbook entry regarding Haapala's performance prior to his discharge.[11]

[10] As to the initial conversation between Laitinen and Haapala, I credit Haapala's uncontroverted testimony. (Tr. 103.) Laitinen testified about the meeting, but not about what he actually said to Haapala. (Tr. 314.) Instead, he stated only that the purpose of the discussion was to "set expectations."

[11] In making these findings of fact concerning Haapala's work performance prior to his discharge, I credit Haapala's testimony (Tr. 104–143, 149–153), including where it conflicts with Laitinen's testimony. What is plainly evident when comparing the testimony is the level of detail provided by Haapala concerning his work on each job, as well as his frankness about issues which arose

ANALYSIS

I. THE SECTION 2(13) AGENCY STATUS OF THOMAS J. MOYLE JR.

The General Counsel's amended complaint alleges that Moyle Jr. is an agent of the Respondent within the meaning of Section 2(13) of the Act. The Respondent denied this allegation, admitting only that Moyle Jr. was the past president, founder, and CEO of the Respondent. Given the prominent role that Moyle Jr. plays in the facts of this case, his agency status is a matter that must be resolved before addressing the substantive allegations.

The Board applies the common-law principles of agency in determining whether an individual is acting with apparent authority on behalf of an employer, when that individual makes a particular statement or takes a particular action. *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001); *Blankenship and Associates*, 306 NLRB 994 (1992). The test for determining whether an individual is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the individual in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987). The Board considers the position and duties of the individual, in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982). When viewed in the context of other factors, family relationship may be sufficient for a finding of agency, based on apparent authority. *Laborers Local 270,* 285 NLRB 1026, 1028 (1987). The burden of establishing that an individual is an agent rests on the party asserting it. *Pan-Oston Co.*, supra, 336 NLRB at 406.

In this case, the person who could have shed the most light on the agency question—Moyle Jr.—was conspicuously absent at the hearing. Nonetheless, Haapala's uncontroverted testimony concerning Moyle Jr.'s statements during the September 28 conversation with Haapala offers strong support for finding that he was acting as the Respondent's agent. Moyle Jr. discussed Haapala's written request that *Moyle Construction* employees receive health insurance. Moyle Jr. told Haapala that Moyle Jr. did not have anything lined up, but had some people looking into it. He also told Haapala that he had sent the union away after it came in and made "us" an offer he did not like. Moyle Jr. further stated that he would shut the place down if he had to. He repeatedly used the term "my employees" when speaking. All of these statements paint the picture that Moyle Jr. not only was speaking for management, but indeed was management.

The context in which this conversation occurred further solidifies Moyle Jr.'s agency status. Moyle Jr. is the family patriarch. He founded Moyle Construction and ran it until 2009. His daughter–in–law is the current owner of the Company. When Helminen took over day–to–day operations, Moyle Jr. retained the title of CEO of Moyle Inc. He remained in his office working in the building from which Moyle Construction and other Moyle companies operated.

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affecting his productivity. Haapala testified confidently and his demeanor otherwise was indicative of reliable testimony. In contrast, Laitinen's testimony was brief, lacking clarity, and non–specific. (Tr. 315–324, 329–340.) He did not appear to have a strong recall of his observation of Haapala's work performance on these jobs. He also appeared, at times, to be to be speculating as to what he observed and did, by using the contents of his notes.

He also visited Moyle Construction jobsites, including Watersmeet on the day Haapala was discharged. During the visits, he spoke both with the Respondent's supervisors and employees about the work being done. He did so while wearing a hard hat indicative of supervisory status at the Company.

Through this conduct, Moyle Jr. cloaked himself in the mantel of apparent authority. Accordingly, I find that Moyle Jr. was a Section 2(13) agent of the Respondent at material times. See, e.g., *Tres Estrellas de Oro*, 329 NLRB 50, 57 (1999) (brother of company owner who also owned a related family enterprise and visited the company's facility on occasion was a Sec. 2(13) agent, even though he no longer worked for company); *Feldkamp Enterprises*, 323 NLRB 1193, 1196–1197 (1997) (semiretired, former owner and COO of business, and father of current president, was 2(13) agent); *Enterprise Aggregates Corp.*, 271 NLRB 978, 982 fn. 18 (1984) (daughter of company president to whom employees addressed questions about insurance and other matters was a Sec. 2(13) agent).

II. THE INDEPENDENT 8(A)(1) ALLEGATIONS

A. Did Moyle Jr. Violate Section 8(a)(1) During His Conversation with Haapala on September 28?

The General Counsel's complaint alleges that the Respondent, by Moyle Jr., unlawfully accused employees of disloyalty; repeatedly threatened employees with unspecified reprisals; equated protected concerted activity to bullying; and threatened employees that he would cease or subcontract the Respondent's operations. These allegations arise out of the conversation between Moyle Jr. and Haapala on September 28.

Having concluded that Moyle Jr. is an agent of the Respondent, the statements he made to Haapala on September 28 are imputable to the Company. Haapala's uncontroverted testimony establishes that Moyle Jr. committed multiple violations of Section 8(a)(1) during the conversation. First, Moyle Jr. commented to Haapala that "friends don't send friends a registered letter" and that he did not like being fucked with or bullied by any of his employees. These comments would reasonably have been understood to mean that Haapala was disloyal for sending the letter and being threatened with retaliation. *Corliss Resources, Inc.*, 362 NLRB No. 21, slip op. at 1–2 (2015) (in response to a remark in support of seniority, a supervisor's labeling of an employee as "a backstabbing piece of shit" and statement that employees were "a bunch of whiners" was coercive); *Hialeah Hospital*, 343 NLRB 391, 391–392 (2004) (supervisor's statement that he felt "betrayed" and "stabbed in the back" because employees contacted union conveyed message that such protected activity was disloyal). Moyle Jr. also thereby equated Haapala's protected conduct to bullying.

Second, Moyle Jr.'s repeated comment that Haapala did not want to be burning his bridges, as well as his suggestion that Haapala find a different job if he did not like his current one, were threats of unspecified reprisals. *Audubon Regional Medical Center*, 331 NLRB 374, 411–412 (2000) (telling employee that she "burned her bridges" by engaging in union or protected concerted activities implied threat of discrimination or discipline); *McDaniel Ford*, 322 NLRB 956, 956 fn. 1 (1997) (telling employees that, if they were unhappy, they should look for jobs somewhere else in response to protected concerted activities violated Sec. 8(a)(1)).

Finally, Moyle Jr.'s comment to Haapala that he would shut the place down or micromanage everything is a classically threatening and coercive comment. See, e.g., *Ace Heating & Air Conditioning Co.*., 364 NLRB No. 22, slip op. at 2 (2016); *Shearer's Food, Inc.*, 340 NLRB 1093, 1093–1094 and 1098 (2003).

B. Did Laitinen Violate Section 8(a)(1) When Informing Haapala He Was Discharged on October 6?

The General Counsel's complaint also alleges that Laitinen created an impression amongst employees that their union and protected concerted activities were under surveillance. This allegation is premised on the conversation between Laitinen and Haapala on October 6.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union or protected concerted activities had been placed under surveillance. *Tres Estrellas De Oro*, supra, 329 NLRB at 51; *United Charter Service*, 306 NLRB 150 (1992). "[T]he Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means." *United Charter Service*, supra, at 151.

Applying these principles here, I conclude that Laitinen's lone statement to Haapala on October 6 that he had been "watching [him] on the side" does not violate the Act. Laitinen made no direct reference to Haapala's union activity or the letter he sent to Moyle Jr. about health insurance. Instead, Laitinen referred back to his initial conversation where he had asked Haapala to step up his productivity. He then added that Haapala had not been pulling his weight. Irrespective of whether Laitinen actually was relying on lack of productivity to discharge Haapala, all of his statements on that date addressed work performance. A reasonable employee could not assume that Laitinen was referring to, and watching, Haapala's protected activity. As a result, I recommend dismissal of this allegation.

III. THE 8(A)(3) DISCHARGE OF TROY HAAPALA

The complaint alleges the Respondent violated Section 8(a)(3) by discharging Haapala due to his union and protected concerted activities. These allegations must be evaluated pursuant to the Board's mixed motive standard as set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014), enfd. 801 F.3d 767 (7th Cir. 2015); *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel carries that initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same

action even in the absence of the protected activity. See, e.g., *Mesker Door,* 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004).

A. Did Haapala Engage in Union or Protected Concerted Activity?

No doubt exists that Haapala engaged in protected concerted activity by sending the September 21 letter to Moyle Jr. In the letter, Haapala requested that the Respondent provide health insurance for him and all of his coworkers. Prior to sending the letter, Haapala spoke with Wanhala and other employees about this issue, discussions he noted in the letter. Haapala also requested a meeting where he and his coworkers could discuss the issue with Moyle Jr. The letter constituted protected activity, because Haapala was seeking to improve a term and condition of employment. The letter was concerted, because he sought this improvement for everyone, the letter grew out of his prior discussions with employees, and he was seeking to induce group action. See *Champion Home Builders Co.*, 343 NLRB 671, 671 fn. 3 and 678–680 (2004), enf. in pertinent part sub nom. *Carpenters Local 1109 v. NLRB*, 209 Fed.Appx. 692 (9th Cir. 2006) (employee who, with the support of coworkers, wrote a "protest letter" raising concerns about working conditions was engaged in protected concerted activity); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) (although originating because of his need to care for wife and children, individual employee's efforts to get employer to approve the use of sick leave for family medical emergencies was protected concerted activity, where employee attempted to obtain benefit for all employees). Haapala also engaged in union activity by enlisting the assistance of Bradshaw and meeting with him to prepare the letter.

B. Is the Respondent's Asserted Reason for Discharging Haapala a Pretext?

In analyzing the General Counsel's burden under *Wright Line*, I normally would address knowledge and animus at this point. However, in the circumstances of this case, the sequence is best altered so that the next step is to resolve whether the Respondent's asserted reason for discharging Haapala was a pretext. Thus, the time has come to address the credibility of Laitinen's testimony and the documentary evidence regarding how and why the Respondent discharged Haapala.

On the question of who decided to discharge Haapala, Laitinen testified, in response to leading questions on direct, that he alone made the decision, without consulting anyone else. (Tr. 346.) This assertion strains credulity to the utmost degree. Although Laitinen was the Respondent's operations manager, he only had been in the position for roughly 4 months at the time of Haapala's discharge. Moreover, he was not the Respondent's highest level supervisor. Helminen, the president, was. The Respondent's employee handbook states that the "President" and an employee's "immediate supervisor" would be involved in any involuntary separations. Yet, by Laitinen's account, neither was. The Respondent did not call Helminen to corroborate Laitinen's testimony. Laitinen also provided no information on if and how he interacts with Helminen and Moyle Jr. in his supervisory capacity. Finally, the record does not reflect that Laitinen discharged any other employees prior to Haapala. The notion that a new supervisor discharging an employee for the first time would not discuss it with his superiors in any manner is inconceivable. This is especially so, given that the employee involved had worked for the Company for 18 years and had not been previously warned that his job was in jeopardy.

I likewise do not credit Laitinen's testimony that he discharged Haapala due to a lack of productivity. At the hearing, Laitinen's testimony about what he observed of Haapala's work performance on October 6 was nonexistent. He stated only that Haapala was doing a lot of talking to other employees. He suggested that Haapala was behind on installing screws on deckboards, but provided no specifics. Laitinen's subsequent written documents about what he observed on that date suffer from the same failure. Neither the logbook nor the termination letter to Haapala's personnel file contain any information about what Laitinen actually observed Haapala doing that day or in what way his performance was deficient. Other than Laitinen's conclusory statements, there simply is no evidence in the record to corroborate Laitinen's assertion that Haapala was not productive when working on October 6.

In contrast, Haapala's uncontroverted testimony establishes that Moyle Jr. was on the jobsite the same day and complimented the workers' job performance. It also establishes that the other workers on the jobsite were no more than three to four boards ahead of Haapala while working that day. Laitinen did not contradict this specific testimony at the hearing. Moreover, the Respondent did not call Pattison, the onsite supervisor, to testify about Haapala's work performance that day or to corroborate Laitinen's claim that Haapala was not productive.[12]

As to Haapala's work performance prior to sending the September 21 letter, the record reflects that Laitinen did have concerns with Haapala being a slow worker on two jobs during the summer of 2015. But Laitinen did not at any point issue written discipline to Haapala or advise him his job was in jeopardy if his productivity did not improve. Moreover, Laitinen's logbook contained no entries from September 3 to October 6 detailing further issues with Haapala's performance. The only intervening event in that time period was Haapala's protected conduct.

Other red flags are present here supporting a finding of pretext. First, the Respondent's asserted reason for Haapala's discharge appeared to be shifting during the hearing. In the Respondent's position statement submitted during the investigation of the underlying unfair labor practice charge, the Company stated that Haapala "was terminated following months of poor performance and productivity." (GC Exh. 15, p. 2.) The period identified was the beginning of the summer of 2015 to October 6, 2015. But then at the hearing, the Respondent argued that it was Haapala's collective body of work which warranted the discharge. Laitinen testified as to alleged productivity issues he observed from Haapala on the first job they worked together 7 years earlier. (Tr. 310–313.) Laitinen even stated, if he had the authority, he would have discharged Haapala after that first observation. Laitinen's testimony in this regard appeared exaggerated and thus indicative of pretext. *Lucky Cab Co.*, 360 NLRB No. 48, slip op. at 4 (2014).

In any event, the record evidence belies Laitinen's claim of prolonged productivity issues. Haapala received positive performance appraisals and pay increases for many years immediately prior to his termination. The last of those came in May 2015. Moreover, as the Respondent's total employees declined from 100 to 25 during Laitinen's seven years of

[12] I decline the General Counsel's request to draw an adverse inference against the Respondent, due to its failure to call any of Haapala's immediate supervisors who also observed Haapala's work during the relevant time period. Rather, I weigh the absence of their testimony as part of my credibility determination for Laitinen's claim that Haapala's job performance was subpar.

employment, Haapala survived the cuts and remained employed. If the Respondent had prolonged issues with Haapala's performance, he would not have remained employed as the Company lost 75 percent of its employees.

Second, Laitinen testified that he made the decision to discharge Haapala on his own without consulting any other supervisor. As detailed above, I reject this contention as it applies to his superiors. However, Laitinen's claim still applies to Haapala's direct supervisors who were on jobsites with him every day and obviously observed his performance more extensively than Laitinen did. The failure to consult with an employee's immediate supervisor before taking action against the employee likewise supports a finding of pretext. *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126, slip op. at 39–40 (2015).

For all these reasons, I find that the Respondent did not discharge Haapala due to his lack of productivity. Thus, the Respondent's asserted reason is a pretext.

C. Did the Respondent Know of Haapala's Protected Activity?

An employer's knowledge of protected conduct can be inferred from its general knowledge of union activity; its demonstrated antiunion animus; the timing of its actions against the employees who engaged in the conduct; and the pretextual nature of its defenses. See, e.g., *Coastal Sunbelt Produce Inc.,* supra, slip op. at 2–3 (2015); *Glasforms, Inc.*, 339 NLRB 1108, 1110 fn. 6 (2003).

In this case, I conclude it is proper to infer the Respondent's knowledge of Haapala's protected conduct. The Respondent, through Moyle Jr., harbored specific animus towards Haapala's letter, demonstrated by the numerous 8(a)(1) violations in the September 28 conversation. The Respondent's discharge of Haapala occurred only 8 days following its receipt of his letter. Finally, the Respondent's stated reason for discharging Haapala is a pretext. Given all these factors, the evidence here warranting a knowledge inference is strong.

In the alternative, a supervisor's or agent's knowledge of an employee's union or protected concerted activities may properly be imputed to an employer, absent a credible denial. *State Plaza Hotel*, 347 NLRB 755, 756 (2006); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). A credible denial requires an affirmative showing that a supervisor who learned of protected activity did not pass on the information to others. Id.

Even if knowledge could not be inferred, Moyle Jr.'s actual knowledge of Haapala's protected conduct can be imputed to the Respondent. Moyle Jr., the Respondent's agent, had direct knowledge of Haapala's union and protected concerted activities, given their September 28 conversation. Moyle Jr. did not testify at the hearing and thus did not provide a credible denial to this conversation occurring or to Moyle Jr. keeping the conversation to himself.

The Respondent attempts to circumvent this problem by pointing to Laitinen's testimony that Moyle Jr. did not tell him about his conversation with Haapala. (Tr. 347–348.) I do not credit this uncorroborated testimony. Rather, I find, based upon circumstantial evidence, that Laitinen knew of the September 28 conversation between Moyle Jr. and Haapala when he discharged Haapala on October 6. The vitriol used by Moyle Jr. when conversing with Haapala

about his letter and the Union makes it likely he would not keep the matter to himself after it ended. His comments became increasingly heated after the subject of Moyle Construction employees going union arose. Human nature alone dictates that Moyle Jr. would discuss what happened with others. Indeed, because of Moyle Jr.'s angry tenor, Haapala himself told Smith, Wanhala, and Bradshaw about the meeting almost immediately thereafter. (Tr. 182–184.) Moreover, Moyle Jr. was the highest–ranking official (CEO) of Moyle Inc. and the family patriarch. His statements make clear that he viewed the Union as a threat to the family businesses. In light of this, the idea that Moyle Jr. would say nothing about this conversation to the Respondent's supervisors and that the information was not provided directly to or ever made its way down to Laitinen is not believable.[13]

Relying on *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493 (7th Cir. 2003), the Respondent argues that the General Counsel is required, as part of the initial *Wright Line* burden, to demonstrate that Laitinen, the decision maker, had knowledge of Haapala's protected conduct. As an initial matter, I note the Respondent's and the Seventh Circuit's position is contrary to Board law, to which I am bound. The General Counsel is not required to demonstrate direct knowledge of protected activity by the individual who made the discharge decision. See, e.g., *State Plaza Hotel*, supra, 347 NLRB at 756; *Willamette Industries*, 341 NLRB 560, 562 (2004).

In any event, applying *Sears Roebuck* would not change the result. The Seventh Circuit does not require direct evidence to establish a decision maker's knowledge. See *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 685–686 (7th Cir. 2000); *GATX Logistics, Inc.*, 323 NLRB 328, enf. 160 F.3d 353 (7th Cir. 1997). In *GATX Logistics*, the Seventh Circuit concluded the Board reasonably inferred that a supervisor told the decision maker of an employee's union activities, due to the supervisor's extreme antiunion animus. In this case, Moyle Jr. is the agent with the extreme animus. Thus, it is reasonable to infer from the circumstantial evidence, as I have, that Moyle Jr. communicated to other supervisors about his September 28 conversation with Haapala and Laitinen had actual knowledge of Haapala's protected conduct when discharging him on October 6.

[13] In addition to this finding, I also agree with the General Counsel that it is appropriate to draw an adverse inference on this question, based upon the Respondent's failure to call Moyle Jr. to testify at the hearing. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994). As a Section 2(13) agent of the Respondent, Moyle Jr. is presumed to be favorably disposed to the Respondent. *Hialeah Hospital*, supra, 343 NLRB at 393 fn. 20. Even if he was not an agent, Moyle Jr. is the family patriarch and remains actively involved in the Moyle family companies. He also assisted the Respondent in preparing its defense during the investigation into the Section 8(a)(1) allegations related to his conversation with Haapala on September 28. (GC Exh. 15.) These facts otherwise demonstrate his favorable disposition to the Company. The Respondent offered no explanation at the hearing for his failure to appear, an absence that was glaring. I therefore conclude that any testimony Moyle Jr. would have provided on the question of whether Laitinen knew, prior to discharging Haapala, about the September 28 conversation between Moyle Jr. and Haapala would have been adverse to the Respondent.

D. Did the Respondent Harbor Animus Towards Haapala's Protected Activity?

Evidence that may establish a discriminatory motive includes the timing of the employer's adverse action in relationship to the employee's protected activity, *Kag-West, LLC*, 362 NLRB No. 121, slip op at 2 (2015); the presence of other unfair labor practices, *Richardson Bros. South*, 312 NLRB 534, 534 (1993); statements and actions showing the employer's general and specific anti-union sentiment, *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); and evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext, including where the employer proffers a non–discriminatory explanation that is not true, *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994).

In this case, the General Counsel's evidence demonstrates convincingly that the Respondent's discharge of Haapala was motivated by its hostility towards his request that employees receive health insurance, which he wrote with the assistance of the Union. Almost immediately after receiving the letter, Moyle Jr. called Haapala into his office for a conversation in which he committed numerous unfair labor practices. Moyle Jr. accused Haapala of disloyalty, suggested his job was in danger, and then threatened that he would close down the business if a union came in. Moyle Jr.'s statements fell in line with the Respondent's stated position—in the very first substantive provision of its employee handbook—that it opposed employees choosing to unionize. Only 8 days following this conversation, the Respondent followed through on Moyle Jr.'s threat and discharged Haapala. The Respondent then asserted a lack of productivity as a pretextual reason for Haapala's discharge.

In sum then, I conclude the General Counsel has met the initial burden required by *Wright Line*. See *Humes Electric, Inc.*, 263 NLRB 1238, 1239–1240 (1982) (despite employer having legitimate concerns over employee's productivity prior to his protected conduct, discharge violated Section 8(a)(3) based upon pretext of the asserted reason and timing of the discharge.)

E. Did the Respondent Demonstrate It Would Have Discharged Haapala Even in the Absence of His Protected Activity?

For all intents and purposes under Board law, my finding of pretext ends the analysis in this case. If the Respondent's reason is pretextual, the General Counsel has satisfied the *Wright Line* burden and the Respondent fails by definition to show that it would have taken the same action for that reason, absent the protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing to *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

Nonetheless, I briefly will address the Respondent's argument in this regard. The Company contends that it demonstrated Haapala's lack of productivity as a legitimate business reason for his discharge. This argument misstates the Respondent's burden. An employer cannot rebut the General Counsel's case by simply producing evidence that a legitimate business reason for the action existed. Instead, the employer must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), citing to *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1981).

Lack of productivity obviously could be a legitimate reason for discharge, for the Respondent or any other employer. Yet, the Respondent did not introduce any evidence that it had discharged employees prior to Haapala for lack of productivity, either before or after Laitinen became operations manager. The record contains no indication for how the Respondent handled other employees' lack of productivity during Haapala's 18 years of employment. In addition, the Respondent did not proffer any evidence of situations where it previously discharged employees without issuing them prior discipline.

Accordingly, I find that, even if the shifting burden of *Wright Line* applied here, the Respondent did not meet its burden of showing it would have discharged Haapala absent his protected conduct. See *Metropolitan Life Insurance Co.*, 288 NLRB 556, 560–561 (1988) (employer did not show with specific testimony or documentary evidence that it previously discharged employees for low productivity).

The Respondent's discharge of Haapala violates Section 8(a)(3).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Iron Workers Local 8 is a labor organization within the meaning of Section 2(5) of the Act.

3. Thomas J. Moyle Jr. is an agent of the Respondent within the meaning of Section 2(13) of the Act.

4. On or about September 21, 2015, Troy Haapala engaged in union and protected concerted activities by drafting a letter, with the assistance of a union representative and another employee, and sending the letter to the Respondent, requesting that the Respondent provide employees with health insurance.

5. The Respondent has violated Section 8(a)(1), on or about September 28, 2015, by:

   (a) Accusing employees of disloyalty;
   (b) Threatening employees with unspecified reprisals;
   (c) Equating union and protected concerted activities to bullying; and
   (d) Threatening employees that it would cease or subcontract its operations if employees chose to be represented by a union.

6. The Respondent has violated Section 8(a)(3) by discharging Troy Haapala due to his union and protected concerted activities.

7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

8. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall order the Respondent to offer Troy Haapala full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make–whole remedy shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Troy Haapala for search–for–work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search–for–work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), the Respondent shall compensate Troy Haapala for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 18 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

I also shall order the Respondent to remove from its files any references to the unlawful discharge of Haapala and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Thomas J. Moyle Jr., Inc. d/b/a Moyle Construction, Houghton, Michigan, its officers, agents, successors, and assigns, shall

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Accusing employees of disloyalty for engaging in union or protected concerted activities.

(b) Threatening employees with unspecified reprisals for engaging in union or protected concerted activities.

(c) Equating union and protected concerted activities with bullying.

(d) Threatening employees with cessation or subcontracting of operations if employees choose to be represented by a union.

(e) Discharging employees for engaging in union or protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Troy Haapala full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(b) Make Troy Haapala whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Troy Haapala for search–for–work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(d) Compensate Troy Haapala for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director of Region 18 allocating backpay to the appropriate calendar year, in the manner set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Troy Haapala, and, within 3 days thereafter, notify him in writing that this had been done and that his unlawful discharge will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its facility in Houghton, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., September 28, 2016

Charles J. Muhl
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT accuse employees of disloyalty for requesting that all employees receive health insurance or for engaging in other union or protected concerted activities.

WE WILL NOT threaten employees with unspecified reprisals for requesting that all employees receive health insurance or for engaging in other union or protected concerted activities.

WE WILL NOT tell employees that engaging in union or protected concerted activities is bullying.

WE WILL NOT threaten employees with the closure or subcontracting of our business, if employees choose to be represented by a union.

WE WILL NOT discharge you because you engage in union or protected concerted activities with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Troy Haapala full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL pay Troy Haapala for the wages and other benefits he lost because we unlawfully discharged him.

WE WILL compensate Troy Haapala for search–for–work and interim employment expenses he incurred after we unlawfully discharged him.

WE WILL compensate Troy Haapala for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director of NLRB Region 18 allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files all references to the discharge of Troy Haapala and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

THOMAS J. MOYLE, JR., INC.
d/b/a MOYLE CONSTRUCTION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Suite 700W, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-165458 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819.